

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
TYLER DIVISION**

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Eolas Technologies Incorporated,

*Plaintiff,*

vs.

No. 6:09-cv-00446-LED (filed Oct. 6, 2009)

Adobe Systems Inc.; Amazon.com, Inc.; Apple  
Inc.; CDW Corp.; Citigroup Inc.; eBay Inc.;  
Frito-Lay, Inc.; The Go Daddy Group, Inc.;  
Google Inc.; J.C. Penney Company, Inc.;  
JPMorgan Chase & Co.; New Frontier Media,  
Inc.; Office Depot, Inc.; Perot Systems Corp.;  
Playboy Enterprises International, Inc.; Rent-A-  
Center, Inc.; Staples, Inc.; Sun Microsystems,  
Inc.; Texas Instruments Inc.; Yahoo! Inc.; and  
YouTube, LLC,

*Defendants.*

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Adobe Systems Inc.; Amazon.com, Inc.; Apple  
Inc.; CDW LLC; eBay Inc.; Frito-Lay, Inc.; The  
Go Daddy Group, Inc.; Google Inc.; J.C. Penney  
Company, Inc.; JPMorgan Chase & Co.; New  
Frontier Media, Inc.; Office Depot, Inc.; Perot  
Systems Corp.; Playboy Enterprises  
International, Inc.; Rent-A-Center, Inc.; Staples,  
Inc.; Oracle America, Inc. f/k/a Sun  
Microsystems, Inc.; Texas Instruments Inc.;  
Yahoo! Inc.; and YouTube, LLC,

*Counterclaimants,*

vs.

Eolas Technologies Incorporated,

*Counterdefendant.*

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**JOINT CLAIM CONSTRUCTION AND PREHEARING STATEMENT**

In accordance with Patent Rule 4-3 and the Court's Docket Control Order, *see* Docket No. 249, the parties hereby submit their Joint Claim Construction and Prehearing Statement. In accordance with Patent Rule 4-2(c), the parties met and conferred on October 7, 21, and 28 for the purposes of narrowing the issues and finalizing preparation of a Joint Claim Construction and Prehearing Statement.

**A. Statement of the Parties**

**1. Eolas' Statement**

The parties dispute the construction of 21 claim terms, plus 54 additional terms defendants contend should be construed pursuant to § 112, ¶6.

Eolas proposed two of the twenty-one disputed terms for construction. Eolas proposed no terms for construction pursuant to § 112, ¶6.

Defendants proposed twenty of the twenty-one disputed terms for construction. Defendants offer 17 different constructions for these 21 terms. Defendants proposed all fifty-four terms for construction pursuant to § 112, ¶6. These 54 additional terms are found in 31 claims of the patents-in-suit. None of the 54 claim terms recite “means for.”

During the meet and confer process, Eolas demonstrated to defendants that the claim terms they have put at issue arise in nearly all of the claims of the patents-in-suit. A reduction in the number of asserted claims will not result in a material reduction of the number of claim construction disputes as defendants suggest. Moreover, Eolas has granted the defendants several extensions of their document production deadlines and therefore, Eolas has not yet been afforded a chance to review the productions of the twenty-one defendants. In light of this, the defendants' suggestion that Eolas reduce the number of claims at issue is premature.

**2. Defendants' Statement**

The Defendants disagree with Eolas's statement. As shown in Section C below, there are 15 groups of disputed terms for construction, and there is disagreement over whether § 112, ¶ 6 applies to 31 of the asserted claims.

The number of disputed issues is a result of two factors: First, Eolas is asserting all 61 claims of the two patents-in-suit against 21 unrelated Defendants. Second, different claim terms

are important to the different groups of Defendants. The Defendants generally fall into three different groups based on their accused products: browsers (e.g., Google's Chrome browser, Apple's Safari browser); software (e.g., Adobe's Flash player, Oracle's Java software); and websites (e.g., Amazon.com, Yahoo.com, and most other defendants).

The Defendants have asked Eolas to reduce the number of asserted claims, but Eolas has refused, notwithstanding the Court's statement to Eolas on August 31, 2010, "I assume plaintiff [Eolas] will narrow those down [the number of asserted claims] before we get too much farther down the road." Hr'g Tr. at 30:25–31:1 [Docket No. 413].

The Defendants have also asked Eolas to drop all infringement theories involving Microsoft products, but Eolas has refused, notwithstanding its prior settlement with Microsoft. As a result, Microsoft has filed a motion for a preliminary injunction against Eolas, which Judge Pallmeyer is scheduled to hear in Chicago on November 23, 2010. The Defendants believe that Eolas should be able to reduce the number of asserted claims, accused products, and/or defendants by no later than the decision on Microsoft's motion for a preliminary injunction. Otherwise, as stated in Section F below, the Defendants may request a prehearing conference after November 23, 2010 — but well in advance of the claim construction hearing on March 3, 2011 — to ask for this Court's assistance.

**B. Agreed-upon constructions**

The chart below provides the construction of those claim terms, phrases, or clauses on which the parties agree:

| <u><b>Claim Term(s)</b></u>                                                                                                      | <u><b>Agreed-Upon Construction</b></u>                                                          |
|----------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------|
| type information . . . utilized by said browser to identify and locate [an / said] executable application                        | the identify and locate functions are performed by the browser                                  |
| with the browser application: . . . utilizing the type information to identify and locate an executable application              |                                                                                                 |
| utilize the browser to: . . . utilize the type information to identify and locate an executable application external to the file |                                                                                                 |
| type information is utilized by the browser to identify and locate said executable application                                   |                                                                                                 |
| with the browser application: . . . identifying and locating an executable application                                           |                                                                                                 |
| executable application . . . is identified and located by the browser                                                            |                                                                                                 |
|                                                                                                                                  |                                                                                                 |
| enable interactive processing of said object                                                                                     | allow the object to be processed based on the user's interaction                                |
| [enable / enabling] an end-user to directly interact with [said / the / an] object                                               | allowing a user to directly interact with the object                                            |
|                                                                                                                                  |                                                                                                 |
| interactively control[ling]                                                                                                      | controlling through back-and-forth interactions between a user and the controllable application |

### **C. Disputed Claim Constructions**

The chart below provides each party's proposed construction of each disputed claim term, phrase, or clause, to the extent that § 112, ¶ 6 does not apply to the claim in which the phrase appears. The parties dispute whether § 112, ¶ 6 applies to any claims. Eolas contends that § 112, ¶ 6 does not apply to any claims. Defendants contend that § 112, ¶ 6 applies to claims 6–10 and 13–14 of U.S. Patent No. 5,838,906 (“the ’906 patent”), and claims 16–35 and 40–43 of U.S. Patent No. 7,599,985 (“the ’985 patent”).

Exhibit A provides Eolas' identification of intrinsic and extrinsic evidence supporting its proposed constructions, as required by P.R. 4-3(b), and Eolas' proposed corresponding structure(s)/act(s) to the extent that § 112, ¶ 6 is found to apply.

Exhibit B provides Defendants' identification of intrinsic and extrinsic evidence supporting their proposed constructions, as required by P.R. 4-3(b), and Defendants' proposed corresponding structure(s)/act(s) to the extent that § 112, ¶ 6 is found to apply.

| <b><u>Claim Term(s)</u></b>                                           | <b><u>Eolas' Proposal</u></b>                                                                                                                    | <b><u>Defendants' Proposal</u></b>                                                                                                                                                                                                   |
|-----------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| automatically [invoking / invoke] [the / said] executable application | automatically calling or activating the <u>executable application</u> <sup>1</sup> .                                                             | in response to the browser parsing an embed text format, the executable application is launched to permit a user to interact with the object immediately, without any intervening activation of the object by the user               |
| executable application is automatically invoked by the browser        | <u>executable application</u> is automatically called or activated by the browser.                                                               |                                                                                                                                                                                                                                      |
|                                                                       |                                                                                                                                                  |                                                                                                                                                                                                                                      |
| workstation                                                           | a computer system connected to a network that serves the role of an information requester                                                        | a desktop or desktide computer with an operating system and hardware designed for technical or scientific applications that provides higher performance than a personal computer                                                     |
|                                                                       |                                                                                                                                                  |                                                                                                                                                                                                                                      |
| network server                                                        | a computer system that serves the role of an information provider                                                                                | a computer running software that is capable of executing applications responsive to requests from a client workstation, and that processes commands from a client workstation to locate and retrieve documents or files from storage |
|                                                                       |                                                                                                                                                  |                                                                                                                                                                                                                                      |
| executable application                                                | any computer program code, that is not the operating system or a utility, that is launched to enable an end-user to directly interact with data. | a compiled native binary program, designed to help users perform certain tasks, that remains discrete and separate from the browser application, and is not the operating system, a utility, or a library                            |
|                                                                       |                                                                                                                                                  |                                                                                                                                                                                                                                      |

<sup>1</sup> Underlining in the proposed construction indicates that the underlined word has been separately construed or separately proposed for construction.

| <u><b>Claim Term(s)</b></u>                                                                                                                                                              | <u><b>Eolas' Proposal</b></u>                                                                                                                                                                                             | <u><b>Defendants' Proposal</b></u>                                                                                                                                                       |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| object                                                                                                                                                                                   | text, images, sound files, video data, documents or other types of information that is presentable to a user of a computer system.                                                                                        | information capable of being retrieved and presented to a user of a computer system, which is not a program and which does not include source code or byte code                          |
|                                                                                                                                                                                          |                                                                                                                                                                                                                           |                                                                                                                                                                                          |
| type information                                                                                                                                                                         | any information used by the browser to identify and locate the executable application, and may include the name of an application associated with the object                                                              | a value needed by the browser to determine which executable application to launch for a given object. The value can specify either a particular application <u>or</u> data type, or both |
|                                                                                                                                                                                          |                                                                                                                                                                                                                           |                                                                                                                                                                                          |
| file                                                                                                                                                                                     | a named collection of data.                                                                                                                                                                                               | a static document stored on a file system                                                                                                                                                |
|                                                                                                                                                                                          |                                                                                                                                                                                                                           |                                                                                                                                                                                          |
| [first] hypermedia document                                                                                                                                                              | a document that allows a user to click on images, sound icons, video icons, etc., that link to other objects of various media types, such as additional graphics, sound video, text, or hypermedia or hypertext documents | a document received by the browser that includes links (specified by the hypertext format) to graphics, sound, video or other media                                                      |
| [first] distributed hypermedia document                                                                                                                                                  | <u>[first] hypermedia document</u> that allows a user to access a remote data object over a network.                                                                                                                      |                                                                                                                                                                                          |
| file containing information to enable a browser application to display [, on] [said/the] [client workstation,] at least [a / said] portion of [a / said] distributed hypermedia document | the file contains information to allow the browser application to display at least part of a <u>distributed hypermedia document</u> .                                                                                     |                                                                                                                                                                                          |
|                                                                                                                                                                                          |                                                                                                                                                                                                                           |                                                                                                                                                                                          |
| text format                                                                                                                                                                              | text that initiates processing.                                                                                                                                                                                           | a predefined set of tags or symbols that specify the formatting of a document                                                                                                            |
|                                                                                                                                                                                          |                                                                                                                                                                                                                           |                                                                                                                                                                                          |

| <u><b>Claim Term(s)</b></u>                                                                                                                                                                                                                                                                   | <u><b>Eolas' Proposal</b></u>                                                                                                                                                  | <u><b>Defendants' Proposal</b></u>                                                                                                                                                                                                                                |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| embed text format                                                                                                                                                                                                                                                                             | <u>text format</u> for embedding an <u>object</u> .                                                                                                                            | a tag that specifies the object to be embedded at the location of the tag                                                                                                                                                                                         |
| embed text format, located at a first location in said first distributed hypermedia document                                                                                                                                                                                                  | <u>embed text format</u> located at a first location in the <u>first distributed hypermedia document</u> .                                                                     | embed text format located at the place in the received document where the embedded object will appear within the displayed document                                                                                                                               |
| embed text format [which] correspond[s/ing] to [a / said] first location in the document                                                                                                                                                                                                      | <u>embed text format</u> which relates to a first location in the document.                                                                                                    | embed text format located at the place in the received file where the embedded object will appear within the displayed document                                                                                                                                   |
| distributed application                                                                                                                                                                                                                                                                       | an application that may be broken up and performed among two or more computers.                                                                                                | application external to the browser, where application tasks that could be performed on a single computer are instead broken up and performed at the same time on both the client workstation and one or more computers that are remote to the client workstation |
| A computer program product . . . comprising a computer usable medium having computer readable program code physically embodied therein, said computer program product further comprising: computer readable program code for causing said client workstation to execute a browser application | the computer program product that includes a computer usable medium having computer readable program code for causing the client workstation to execute a browser application. | a physical item that is commercially available and includes the computer code necessary to run a browser application on a client workstation                                                                                                                      |
| computer readable media encoded with software                                                                                                                                                                                                                                                 | computer readable media having software.                                                                                                                                       | a physical item that includes the computer code necessary to run a browser application on a client workstation                                                                                                                                                    |

| <u><b>Claim Term(s)</b></u>                                        | <u><b>Eolas' Proposal</b></u>                                 | <u><b>Defendants' Proposal</b></u>                                                                                                                                                                                               |
|--------------------------------------------------------------------|---------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| pars[e/es/ed/ing]                                                  | to break an input into smaller pieces.                        | decomposing a string of text using a grammar and categorizing its components                                                                                                                                                     |
| identify[ing] an embed text format                                 | identifying an <u>embed text format</u> .                     | detecting an embed text format during parsing of a hypermedia document                                                                                                                                                           |
| an embed text format . . . is identified                           | an <u>embed text format</u> is identified.                    |                                                                                                                                                                                                                                  |
| specifies the location of at least a portion of [an / said] object | specifies the location of at least part of an <u>object</u> . | specifies the location of at least a portion of [an / said] object<br><br>Where "specifies" has its common meaning: "to name or state explicitly or in detail." (See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 9th Edition (1991)) |

**D. Anticipated length of time for the Claim Construction Hearing**

The parties anticipate that the Claim Construction Hearing will require three hours. The Court previously scheduled the Claim Construction Hearing for March 3, 2011, starting at 9:30 a.m. *See* Docket No. 249.

**E. Identification of witnesses**

No party proposes calling any witnesses, including experts, at the Claim Construction Hearing.

**F. Other issues**

The Defendants may file a request for a prehearing conference after November 23, 2010, the date on which Judge Pallmeyer in Chicago is scheduled to hear Microsoft's motion for a preliminary injunction against Eolas. *See Microsoft Corp. v. Eolas Techs. Inc.*, No. 1:10-cv-03820 (N.D. Ill. filed June 18, 2010). The Defendants believe that the ruling by Judge Pallmeyer may provide an opportunity for the parties in this Court to narrow the scope of this case.

Eolas does not believe that such a hearing is necessary at this time.



DATED: October 29, 2010

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**CERTIFICATE OF SERVICE**

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on October 29, 2010.

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